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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 189

THE FANNER MANUFACTURING COMPANY,
Petitioner,

vs.

PREFORMED LINE PRODUCTS COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITIONER'S REPLY BRIEF.

Petitioner prays that the instant reply brief be considered in view of respondent's misrepresentations in its brief in opposition.

I.

THERE WAS NO PURGE OF ILLEGAL TYING PRACTICES AND EXCLUSIVE DEALING ARRANGEMENTS.

The District Court incorrectly relied upon *passage of time alone,* without any showing of recompense and restoration, as adequate to purge the illegal tying practices and exclusive dealing arrangements (Section 3 of Clayton Act,

15 U. S. C. § 14, App. 39-A).* This constitutes an error of law, although plaintiff-respondent attempts to side-step the District Court's application of this improper legal standard and conveniently and incorrectly treats the District Court's decision as involving issues of fact only.

In denying an early hearing as to whether respondent had purged its unlawful conduct and its consequences, the District Court stated:

> "When are they dissipated and how are they dissipated? Certainly they are not dissipated overnight, not dissipated in a month or so." (D. App. 269a.)

Even though all testimony on the question of purge was given at the hearing of June 12-15, 1961 (D. App. 275a-322a), the District Court in conclusion of law 3 (D. App. 339a) held the purge was completed August 1, 1961, which was *after* the testimony. The purge thus could only have been based on the passage of time alone, since no testimony of affirmative acts was available to support such a conclusion.

In affirming the period of time relied on by the District Court, the Court of Appeals held:

> "We think the time fixed by the trial judge for the dissipation of the consequences of the misconduct is fair and reasonable and not an abuse of his discretion." (App. 36-A.)

The *burden* was on the respondent to show that *each* of the misuse *consequences* was fully dissipated. The Courts below did not place this burden upon the respondent, the

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* The following abbreviations are used by petitioner:
App. .....: Appendix attached to petition.
D. App. .....: Petitioner's appendix in the Court of Appeals.
P. App. .....: Respondent's appendix in the Court of Appeals.

wrongdoer. This, too, constitutes an error of law that is conveniently ignored by respondent.

Respondent presented no evidence that the injury done to those it had harmed had been repaid.

Respondent presented no evidence that petitioner's business had been restored.

Respondent presented no evidence showing that it does not possess a larger percentage of the market than it otherwise would have had except for the misuse.

These essential ingredients of "restoration and recompense" were not considered by the Courts below.

The questions of law presented by the Courts' errors in relying on time alone and not requiring the respondent-wrongdoer to assume the burden of affirmatively showing dissipation of all of the consequences have not heretofore been determined by this Court. The determination of these questions by the Courts below renders ineffective Section 3 of the Clayton Act by allowing monopolistic *effects* to continue after the discontinuation of the unlawful practice. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356, 66 L. Ed. 653 (1922). These questions of law are of great importance to the general public and certainly provide infinite possibilities for public and private harm to (a) those who compete in a market with one, such as respondent,* who has sufficient economic power, dominance or influence to force or coerce tie-in and exclusive dealing arrangements upon distributors, and (b) those who purchase from such economically coerced distributors.

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* The vice president of sales for respondent testified that respondent had over 70% of the market for helically preformed reinforcements and attachments for cables (D. App. 322a).

II.

MISUSE EXISTS BASED ON RESPONDENT'S SALES OF UNPATENTED PRODUCTS WITH AN IMPLIED LICENSE TO COMPLETE PATENTED STRUCTURE OR COMBINATION.

Petitioner correctly contended in its petition that respondent (the *largest* manufacturer and seller in the U. S. of helically preformed reinforcements and attachments for use on cables) does not sell the products claimed in Patent 2,761,273 (D. App. 167a-176a) but, instead, continues to sell *unpatented* grips for dead ends with an implied license to its customers to complete, later, the patented structure or combination.

In its brief in opposition to the petition, respondent states that claim 14 "does not require that the legs of the dead end be intertwisted with each other or around a cable" (p. 6).

Claim 14 (D. App. 175a) is as follows:

> "14. A gripping device comprising a plurality of helices mutually conforming as to hand of lay, internal helical diameter, and pitch length, the latter two dimensions being such as to admit of wrapping the helices around a linear body from a side of the body into tightly gripping, encircling relation therewith, said helices being inter twisted into association coaxially with each other, and, *as associated*, defining a relatively straight linear body gripping portion and a curved bight portion at one end of said gripping portion." (Emphasis added.)

The grips sold by respondent (see hairpin grip structure on page 11 of petition) do *not* have, as clearly recited in claim 14, helical legs that are "inter twisted" or wrapped "coaxially with each other"—and a cable ("linear body")

—to form "a relatively *straight* linear body gripping portion" and "a curved bight portion" at "one end of the gripping portion." Thus, claim 14 requires that the two legs be "inter twisted into association coaxially with each other" and that the *resulting* inter twisted legs, "as associated," have a "gripping portion" with a "bight portion" at one end thereof. No mention is made of separated legs that provide gripping portions and curved bight portions which hairpin-like structure characterizes respondent's product as sold.

The twisting of the legs is done by the purchaser by taking the legs (half-lays which together form a hollow body) of the hairpin structure shown on page 11 of the petition and twisting or wrapping them together around a cable or about themselves ("coaxially with each other") into a whole lay ("relatively straight linear body gripping portion") to form either the patented wrapped dead end or patented combination of the wrapped dead end and encased cable.

Respondent's, as well as the lower Courts' enlargement of respondent's lawful patent monopoly (restraint of competition in goods not covered by the patent) is of serious import and petitioner should not be foreclosed from a consideration and determination (by this Court or upon remand of the case by this Court to the District Court) of misuse.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari herein sought should be granted.

Respectfully submitted,

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